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In the Supreme Court of the United States

OCTOBER TERM, 1990

PROGRESS MARINE, et al.,

Cross-Petitioners

VERSUS

FRED QUAVE

Cross-Respondent

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Circuit Court of Appeals for the Fifth Circuit properly affirmed the District Court's award of pre-judgment interest pursuant to a supplemental order of default which was not entered "in accordance with law" as required by Section 918(a) of the Longshore and Harbor Workers' Compensation Act?

2. May a federal district court award pre-judgment interest on compensation found to be due a claimant under the Longshore and Harbor Workers' Compensation Act although the statute does not provide for such an award?

3. Does a judgment awarding pre-judgment interest on compensation due under the Longshore and Harbor Workers' Compensation Act violate the payor's right to due process when the delays between the time of the injury and the date of judgment are not caused by the payor?

LIST OF PARTIES

The following are the parties to this proceeding:

Fred Quave
Plaintiff-Petitioner

Progress Marine (Dolphin Titan Intenational, Inc.)
Defendant - Cross-Petitioner

American Home Assurance Company c/o
American International Adjustment Company[1]
Defendant - Cross-Petitioner

The Petition for Writ of Certiorari filed by Fred Quave was received on February 7, 1991.

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[1] American International Group is the parent company of American Home Assurance Company and American International Adjustment Company; American Home Assurance Company has one subsidiary that is not wholly owned, AIG Realty, Inc.: American International Adjustment Company has no subsidiaries that are not wholly owned.

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NO.

IN THE

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OCTOBER TERM, 1990

PROGRESS MARINE, et al.,

Cross-Petitioners

VERSUS

FRED QUAVI,

Cross-Respondent

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Cross-Petitioners, Progress Marine and American Home Assurance Company ("employer/carrier") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on September 24, 1990, with opinion on rehearing rendered on November 14, 1990 and denied on December 13, 1990.

DECISIONS BELOW

The original opinion of the United States Court of Appeals for the Fifth Circuit is reported at 912 F.2d 798 and is reprinted in the appendix, p. A-1. The opinion on rehearing is reported at ____ F.2d ____, and is reprinted in the appendix, p. A-7. The denial of rehearing and rehearing en banc is unreported and is reprinted in the appendix, p. A-10.

The decision of the United States District Court for the Eastern District of Louisiana (Schwartz, J.) is reported at 721 F.Supp. 784 and is reprinted in the appendix, p. A-11. The Amended Judgment of the United States District Court for the Eastern District of Louisiana (Schwartz, J.) is not reported; it is reprinted in the appendix, p. A-19.

The Findings of Fact of the Deputy Commissioner, U.S. Department of Labor, Employment Standards Administration, dated March 22, 1989, is unreported and is reprinted in the appendix, at p. A-23.

The Decision and Order on Remand of the Office of Administrative Law Judges, U.S. Department of Labor, dated November 30, 1987 (McKenna, ALJ) is unreported and is reprinted in the appendix, p. A-28.

JURISDICTION

Petitioner, Fred Quave ("claimant"), instituted this action in the United States District Court for the Eastern District of Louisiana for enforcement of a supplemental compensation order, invoking that court's jurisdiction

under 33 U.S.C. § 918. In the proceedings below, the federal district court issued a judgment, dated September 12, 1989, finding that payment of compensation had been timely made and no penalty was due, thus refusing to enforce the compensation order; the district court issued an amended judgment, dated October 26, 1989, awarding prejudgment interest and attorney fees.

On cross-appeals, the United States Court of Appeals for the Fifth Circuit rendered an opinion on September 24, 1990, and an opinion on rehearing on November 14, 1990 and denying rehearing on December 13, 1990, affirming the district court.

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

This cross-petition seeking review of the Judgment of the United States Court of Appeals is timely filed pursuant to Rule 13.5 of the Rules of the Supreme Court of the United States.

STATUTES INVOLVED

33 U.S.C. § 914

> (a) Compensation under this Act shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.
>
> (b) The first installment of compensation shall become due on the fourteenth day after the employer has been notified pursuant to section

12, or the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments, semimonthly, except where the deputy commissioner determines that payment in installments should be made monthly or at some other period.

(c) Upon making the first payment, and upon suspension of payment for any case, the employer shall immediately notify the deputy commissioner, in accordance with a form precribed by the Secretary, that payment of compensation has begun or has been suspended, as the case may be.

(d) If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the Secretary, stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

(e) If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such non-payment is excused by the deputy commissioner after a showing by the

employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(f) If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 21 and an order staying payments has been issued by the Board or court.

(g) Within sixteen days after final payment of compensation has been made, the employer shall send to the deputy commissioner a notice, in accordance with a form prescribed by the Secretary, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and any other period to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If the employer fails to so notify the deputy commissioner within such time the Secretary shall assess against such employer a civil penalty in the amount of $100.

(h) The deputy commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, or hold such hearing, and take such

further action as he considers will properly protect the rights of all parties.

(i) Whenever the deputy commissioner deems it advisable he may require any employer to make a deposit with the Treasurer of the United States to secure the prompt and convenient payment of such compensation, and payments therefrom upon any awards shall be made upon order of the deputy commissioner.

(j) If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

(k) An injured employee or in case of death his dependents or personal representative, shall give receipts for payment of compensation to the employer paying the same and such employer shall produce the same for inspection by the deputy commissioner, whenever required.

STATEMENT OF THE CASE

The facts most pertinent to the resolution of this application are the lengthy pre-judgment procedural delays for which employer/carrier have been assessed interest. Fred Quave was injured while employed offshore as a crane operator and welder on November 24, 1975. His employer, Progress Marine, and its insurer, American Home Assurance Company c/o American International Adjusting Company (hereinafter "employer/carrier"), paid benefits for temporary, total disability under the Longshore and Harbor Workers' Compensation Act, as extended by the Outer Continental Shelf Lands Act, until January 13, 1976, when Mr. Quave returned to his regular duties. He worked

through 1976, but in September 1977, he again began medical treatment for symptoms allegedly related to the 1975 accident. After recuperating at home for a few weeks, Mr. Quave continued to work light duty for Progress Marine until he was laid off on September 5, 1978. He has claimed permanent, partial disability commencing on that date.

The claimant filed a claim with the Office of Workers' Compensation Programs, U.S. Department of Labor on May 30, 1978 for the on-the-job injury he sustained on November 24, 1975 while employed by Progress Marine, over two and one-half years after his accident.

The claimant's claim proceeded to Formal Hearing before the Office of Administrative Law Judges, U.S. Department of Labor in May 1981. The Administrative Law Judge ("ALJ") determined that the claim was barred by the applicable statute of limitations, 33 U.S.C. § 913. Claimant then appealed the decision and order of the ALJ to the Benefits Review Board, the administrative appeals agency of the U.S. Department of Labor. The ALJ's decision and order was reversed and remanded on February 25, 1986, approximately five years after the appeal.

On December 2, 1987, without conducting a further Formal Hearing the ALJ's Decision and Order on Remand was filed with the Office of Workers' Compensation Programs, awarding past due temporary total disability and permanent partial disability benefits. The claimant was also awarded interest pursuant to 28 U.S.C. § 1961 on all past due benefits outstanding.

However, the ALJ did not calculate the specific amount of permanent partial disability benefits. Instead, the ALJ ordered the Deputy Commissioner, Office of Workers' Compensation Programs, to make the

appropriate calculations based upon the difference between the claimant's average weekly wage at the time of injury and his post-injury wage earning capacity. The ALJ further ordered the Deputy Commissioner to adjust the wage earning capacity "to reflect the increases in minimum wage since 1978."

The employer/carrier filed a Petition for Stay of the Administrative Law Judge's order with the Benefits Review Board based upon 33 U.S.C. § 921 which was denied. Accordingly, the employer/carrier issued a check in the amount of $90,002.47 to the claimant and mailed it to him via Express Mail, U.S. Mail, on Friday, December 11, 1987, within ten days of the filing of the order. Claimant received the compensation payment on Tuesday, December 15, 1987.

Subsequently, claimant filed a request for more compensation and for penalties under the twenty (20%) percent penalty provision, 33 U.S.C § 914(f), through the Office of Workers' Compensation Programs. On March 22, 1989, approximately one and one-half years after the entry of the order, the Deputy Commissioner issued a Supplemental Compensation Order Declaring Default, awarding the twenty percent penalty due to untimely payment. The Deputy Commissioner also performed the calculations of permanent partial disability and incorrectly computed the amount of off-set for minimum wage increases. Despite the Deputy Commissioner's failure to compute the correct amount of compensation benefits, she nevertheless entered a default.

The deputy commissioner found employer/carrier in default for compensation, and awarded claimant penalties for late payment under Section 914(f), as well as interest amounting to $11,293.63.

Claimant filed an action in the district court to

enforce this supplemental compensation order pursuant to 33 U.S.C. § 918. The court held against claimant, finding that the deputy commissioner erred in awarding additional benefits and in assessing a penalty for late payment. In an amended judgment, dated October 26, 1989, the district court awarded claimant pre-judgment interest on temporary total benefits for the period from December 2, 1977, to December 14, 1987, and on permanent partial benefits from September 5, 1978, through December 14, 1987. This award of pre-judgment interest, totalling $11,293.63, is the subject of the present application.

On appeal, the Fifth Circuit held that compensation was timely paid within ten days of the order of the ALJ by operation of Federal Rule of Civil Procedure 6(a); hence, no penalties were due. The court of appeal nonetheless affirmed the district court order requiring employer/carrier to pay pre-judgment interest on past due compensation.

REASONS WHY WRIT SHOULD BE GRANTED AND ARGUMENT

I. The courts below erred in awarding pre-judgment interest on past due compensation benefits under the Longshore and Harbor Workers' Compensation Act because the supplemental order which imposed the interest was not "in accordance with law" as required by Section 918 of the Act.

The compensation order awarding benefits to the claimant stated that: "the specific dollar computations of the compensation award shall be administratively performed by the Deputy Commissioner." Although the order listed the amount of the claimant's average weekly wage and that the claimant's earning capacity was to be periodically adjusted to reflect the increase in minimum wage, the order did not specify the amount of the compen-

sation due or the manner in which to calculate the claimant's earning capacity for the time periods during which the minimum wage was increased. The compensation order was filed in the office of the Deputy Commissioner, and copies of the order were mailed to each of the parties.

The Deputy Commissioner did not perform the specific dollar computations as ordered by the Administrative Law Judge until March 22, 1989 and entered a supplemental order of default for an underpayment, a twenty percent penalty as provided by Section 914(f), and interest on the past due compensation.

The courts below did not focus on the void conntained in the Deputy Commissioner's supplemental compensation order wherein the minimum wage remained constant for the purposes of the calculations, contrary to the directive of the Administrative Law Judge's order; Without a fixed and correct compensation figure, any interest calculations are erroneous and uninforceable. Thus, the Deputy Commissioner's supplemental compensation order awarding interest was incorrectly calculated and not made in accord-
ance with law. 33 U.S.C. § 918(a); see *Severin v. Exxon Corp.*, 910 F.2d 286 (5th Cir. 1990).

In *Severin*, the court examined a compensation order wherein the Administrative Law Judge failed to specify the amount of a wage credit or provide a clerical, mathematical method for the Deputy Commissioner to determine the specific dollar computation of the award. The court explained that "the amount of Exxon's wage credit was subject to genuine dispute. In the absence of a set figure for Exxon's wage credit, it was impossible for the Deputy Commissioner to calculate the compensation owed to Severin and for Exxon to comply with the compensation order. The order was therefore not 'a final decision and

order' which was 'due' or 'effective,' even though it was filed in the office of the Deputy Commissioner. SInce the Deputy Commissioner erred in concluding that payment was 'due' under the compensation order on the date of its original filing and that Exxon was thus liable for a Section 14(f) penalty, the supplemental order of default was not entered 'in accordance with law,' and the District Court properly declined to enforce it." *Severin*, citing 33 U.S.C. § 918(a).

Similarly, in the present case, the Administrative Law Judge did not provide for a method of calculation of the compensation award based upon facts contained in the record or specify the amount of compensation due and owing to the claimant. Any interest assessed depends upon a proper and mathematically correct calculation of the past due compensation. As of this date, the Deputy Commissioner has yet to perform the correct dollar computation for the past due compensation benefits, and as such, any interest awarded utilizing those erroneous calculations is indeterminable.

In *Severin*, the court noted that the order of the Administrative Law Judge "must at a minimum specify the amount of compensation due or provide a means of calculating the correct amount without resort to extra-record facts which are potentially subject to genuine dispute between the parties." The court then held that "a compensation order which fails to do so is therefore not final and enforceable and is not subject to a Section 14(f) penalty, even if the incomplete order has been filed in the office of the Deputy Commissioner." Because the interest awarded was contained in a supplemental order of default that was not entered "in accordance with law" as required by Section 918(a) of the Act, the judgment awarding interest should be vacated.

II. The courts below erred in assessing pre-judgment interest on an award of Longshore and Harbor Workers' Compensation benefits because the statute does not provide for such interest.

The payment of compensation under the Longshore and Harbor Workers' Compensation Act is governed by 33 U.S.C. § 914. This statute is a comprehensive scheme that, among other provisions, sets forth: the timing of compensation payments, with and without an award; penalties in the form of a percentage of each installment for untimely payments of compensation, with and without an award; and the time within which an employer may controvert liability for compensation. Neither Section 914 nor any other statute provides for pre-judgment interest on compensation payable under the LHWCA.[2]

A. The Longshore and Harbor Workers' Compensation Act is a comprehensive statute, evincing the intent of Congress to provide complete and exclusive remedies for the injured longshoreman.

It cannot be disputed but that the assessment of pre-judgment interest on Longshore and Harbor Workers' Compensation Act benefits would create a remedy not provided in the statutory scheme. Although the precise issue of the creation of such a remedy is novel, the courts of appeal have many times considered whether the remedies provided in the Longshore and Harbor Workers' Compensation Act are exclusive. In *Atkinson v. Gates, McDonald & Co.*, 838 F.2d 808 (5th Cir. 1988), the court refused to

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[2] Interest is payable as a matter of law commencing from the date of all civil money judgments entered by federal courts. 28 U.S.C. § 1961. This section provides only for interest on the judgment itself, which is not at issue in this case. Pre-judgment interest, the issue here, is left to "other principles of law." *Illinois Central R. Co. v. Texas Eastern Transmission Corp.*, 551 F.2d 943 (5th Cir. 1977).

permit a worker to file a tort claim for intentional infliction of emotional distress allegedly caused by the termination of benefits. The court found nothing in the legislative history that indicated congressional intent to provide any remedies beyond those explicitly set forth in the statute.

> The legislation which became the 1984 amendments to the Longshore and Harbor Workers' Compensation Act was the product of several years of congressional consideration. During this period of time, organized labor took the position that employers all to often arbitrarily refuse to pay compensation resulting in "cases of members virtually having been forced to accept settlement far below their proper entitlements" under the Longshore and Harbor Workers' Compensation Act, as "the injured worker in need of immediate care and income protection is in a far more vulnerable position than his employer or longshore insurance carrier. *See generally*, Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981: Hearings on S. 1182 Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, 97th Cong., 1st Sess. 433, 516-23, 545 (1981). Congress, however, did not enact any legislation to modify the employer's absolute, unfettered right under the Longshore and Harbor Workers' Compensation Act to controvert compensation claims, nor did it change the penalty structure of section 14 of the LWHCA; rather, it confined its action in respect to these concerns to enacting the new above-referenced section 31(c) and increasing the penalties provided in section 38.

Id. at 811.

These same considerations are pertinent to the

statute's lack of provision for pre-judgment interest. Although Congress was fully aware of employers' right to controvert compensation and also knew of cases of arbitrary refusal to pay, it declined to make any provision for the awarding of pre-judgment interest, even on a discretionary basis. The inaction of Congress in this area indicates its satisfaction with the balance of rights and remedies presently contained in the statute. The administrative agencies and courts charged with applying the Longshore and Harbor Workers' Compensation Act should not construe the absence of a provision for pre-judgment interest as mere oversight. It is not "permissible to construe a statute on the basis of a mere surmise as to what the Legislature intended and to assume that it was only by inadvertence that it failed to state something other than what it plainly stated." *Doski v. Goldseker Co.*, 539 F.2d 1326 (4th Cir. 1976).

Following this reasoning, *Director, Office of Workers' Compensation Programs, U.S. Department of Labor v. Robertson*, 625 F.2d 873 (9th Cir. 1980), refused to permit an award of attorney fees not provided for in the LHWCA. While recognizing that the statute should be construed liberally, the court could not "disregard the plain meaning of the statute or its legislative history, nor [could it] create rights not given or implied by the terms of the Act." *Id.* at 878 n. 9. Similarly, in *Maryland Ship Building and Drydock Co. v. Jenkins*, 594 F.2d 404 (4th Cir. 1979), the court refused to expand remedies available to an injured longshoreman. "Although the Act should be interpreted liberally, the plain terms of the statute may not be disregarded." *Id.* at 406 (citing *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 200 (1952)).

As this Court recently noted in *Miles v. Apex Marine Corp.*, 489 U.S. ____, 112 L.Ed. 2d 275, 111 S.Ct. ____ (1990) (No. 89-1158), "legislation sends other signals to

which an admiralty court must attend. 'The legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect.' *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 392 (1970)." The Court further held that "Congress, in the exercise of its legislative powers, is free to say 'this much and no more.' An admiralty court is not free to go beyond these limits." Miles, supra, at 112 L.Ed. 2d 285.

The awarding of pre-judgment interest on compensation under the Longshore and Harbor Workers' Compensation Act is a recent aberration. For approximately forty years after the enactment of the Longshore and Harbor Workers' Compensation Act in 1927, interest was never assessed on delinquent installments. In the late 1960's the Benefits Review Board began to include interest as part of awards, relying on state court decisions reasoning that interest was due as "damages" for the detention of compensation payments. *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225, 1228 (5th Cir. 1971).

The Court soundly criticized this trend in *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268 (1980).

> Our task is to ascertain the congressional intent underlying the schedule benefit provisions enacted in 1927; we are not free to incorporate into those provisions subsequent state-law developments that we may consider sound as a matter of policy. In attempting to ascertain the legislative intent underlying a statute enacted over 50 years ago, the view that once "dominate[d] the field" is more enlightening than a recent state-law trend that has not motivated subsequent Congresses to amend the federal

> statute. The once dominant view is entirely consistent with a literal reading of the Act.

Id. at 280.

This reasoning was followed in *Morrison-Knudsen Construction Co. v. Director, Office of Workers' Compensation Programs, United States Department of Labor,* 461 U.S. 624, 635 (1983), in which the court rejected an argument that employer contributions to certain trust funds constituted wages for the purpose of calculating compensation benefits under the LHWCA. "[A] comprehensive statute such as this Act, is not to be judicially expanded because of 'recent trends.' "

A literal reading of the Act reveals no mention of pre-judgment interest. As the Fifth Circuit noted in *Atkinson,* the Longshore and Harbor Workers' Compensation Act is a detailed, comprehensive remedial statute that has undergone frequent amendments. Rather than providing for pre-judgment interest, however, Congress repealed a provision in the Act that permitted it. The only case to have directly considered the issue at bar relied on this repealed provision, 33 U.S.C. § 914(m). The issue in *Strachan Shipping Co. v. Wedemeyer,* 452 F.2d 1225 (5th Cir. 1971), was whether the Deputy Commissioner was authorized to assess interest on "each installment of compensation from the time payment would have been due had not the employer controverted the right to compensation." The amount of interest at issue in *Strachan* was nominal because both the delay and the amount of compensation found owing were minimal. Moreover, unlike the delay in the instant case, that in *Strachan* was due entirely to the payor's controverting the compensation. While *Strachan* approved the award of interest under these circumstances, it explicitly relied on Section 914(m) of the Act, which was subsequently repealed. *Id.* at 1227. That section provided

for the payment of "any amount accruing as interest upon defaulted compensation collectible under section 918 of this title." It was the only reference to interest contained in the Act; hence, its repeal manifests the intent of Congress to preclude the payment of interest on Longshore and Harbor Workers' Compensation Act compensation. The opinion of the court of appeal in the instant case incorrectly construed *Strachan*, finding that it did not rely upon Section 914(m) and overlooking the critical distinction in the reasons for the delay of payment.

B. The awarding of pre-judgment interest does not further the policies underlying the LHWCA.

When a statute neither provides for nor explicitly prohibits interest, the courts must look to the intent of Congress as manifested in the statute. Thus, beyond the general rules of statutory construction, "this Court has fashioned rules which granted or denied interest on particular statutory obligations by an appraisal of the congressional purpose in imposing them and in light of general principles deemed relevant by the Court." *Rodgers v. United States*, 332 U.S. 371, 373 (1947). The Court explained that "a persuasive consideration in determining whether such obligations shall bear interest is the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed." *Id.*

The refusal of Congress to provide for pre-judgment interest is consistent with the purpose of the LHWCA. As described in *Potomac Electric:*

> [S]tatutes of this kind do not purport to provide complete compensation for the wage earner's economic loss. On the contrary, they provide employers with definite and lower limits on potential liability than would have been applicable in

> common-law tort actions for damages. . . . It therefore is not correct to interpret the Act as guaranteeing a completely adequate remedy for all covered disabilities.

In the maritime context, pre-judgment interest may be denied "where plaintiff improperly delayed resolution of the action, where a genuine dispute over a good faith claim exists in a mutual fault setting, where some equitable doctrine cautions against the award, or where the damages award was substantially less than the amount claimed by plaintiff." *Reeled Tubing, Inc. v. M/V Chad G.*, 794 F.2d 1026, 1028 (5th Cir. 1986). Both a plaintiff's delay in filing an action and the reason for delays may be considered in the balance of equities. *Michaels v. Michaels*, 767 F.2d 1185, 1204 (7th Cir. 1985). The Third Circuit held in *Thomas v. Duralite Co.*, 524 F.2d 577, 589 (3rd Cir. 1975), that "[i]nterest is not to be recovered merely as compensation for money withheld but, rather, in response to considerations of fairness." A plaintiff may also be denied pre-judgment interest when his bad faith estimate of damages inhibited settlement or when he has not sustained actual damages. *Matter of Bankers Trust Co.*, 658 F.2d 104, 108 (3d Cir. 1981). Several of these considerations are present in the instant case.

Initially, the claimant was dilatory in filing his claim for benefits. Although the claimant sustained an alleged on-the-job injury in 1975, he failed to file his claim for benefits within the prescribed one-year time period as set forth in the Longshore and Harbor Workers' Compensation Act. 33 U.S.C. § 913. In fact, it was not until nearly three years after his alleged on-the-job injury that the claimant filed his claim with the Office of Workers' Compensation Programs. Several more years pasted until the claim was presented for adjudication at the Formal Hearing. None of the delay in proceeding to a trial of the issues is at-

tributable to the employer/carrier and as such it is inequitable to impose pre-judgment interest on an award of past due compensation benefits. Moreover, the claimant waited hearly another one and one-half years to file for the aooeged additional penalties in the district court.

The delay of this claim was compounded by the administrative delays involved in the appeals process to the Benefits Review Board.

III. The assessment of pre-judgment interest on an award of Longshore and Harbor Worker's Compensation benefits deprives the compensation payor of property without the due process of law when long delays between the time of injury and the date of the judgment are not caused by the payor.

The accident that is the subject of this litigation occurred on November 24, 1975. The compensation payor has been ordered to pay pre-judgment interest on the claimant's award of temporary total benefits from December 2, 1977, through December 14, 1987. Pre-judgment interest on permanent partial benefits was assessed from September 5, 1978, through the same date. The period, of approximately ten years, during which the lower courts have held that interest was accruing, was due to additional delays in the administrative and judicial process. The compensation payor did not cause the delay. Hence an award of interest, assessed for the period during which there was no legal obligation to pay benefits, deprives the compensation carrier of its property without due process of law.

This court has recognized that "at some point, a delay in [administrative proceedings] would become a constitutional violation." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 547 (1985). The due process "opportunity to be heard must be 'at a meaningful time and in a meaningful manner.' " *Barry v. Barchi*, 443 U.S. 55, 66

(1979) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

The judgment levying interest against employer/carrier violates procedural due process because the court's action causes employer/carrier substantial prejudice. *Calderon-Ontiveros v. Immigration and Naturalization Service*, 809 F.2d 1050, 1052 (5th Cir. 1986).

> The form of due process is set forth in the law by statutes and/or rules and regulations. The substance of due process is satisfied or not satisfied by what happens in fact. Because a statute, regulation, or rule provides for notice and an opportunity to be heard does not mean that, in fact, there was due process. Due process requires both the form for providing due process as well as timely due process. It is thus necessary for the courts to look at the operative facts in order to determine if the due process requirement is satisfied. Unreasonable delays in affording a hearing and a decision by a state or local governmental agency does not afford due process. The requirement of due process is only satisfied when the state or local agency affords a party a fair and timely hearing and decision without unreasonable continuances and delays.

Lesher v. Lavrich, 632 F. Supp. 77, 83 (N.D. Ohio 1984), *aff'd*, 784 F.2d 193 (6th Cir. 1986). In the present case, employer/carrier was subject not only to unreasonable delays, they were then penalized for those delays.

The employer/carrier recognize that there are administrative and procedural delays involved in the appellate process. However, the instant case reflects such ex-

treme circumstances of judicial delay that this, in and of itself, amounts to a denial of due process rights wherein the payment of an interest penalty is imposed.

The employer/carrier submit that the interest penalty has been assessed for the time period during which this claim was pending review before the Benefits Review Board, a delay created solely by virtue of the understaffing and inadequacy of the administrative appeals agency. See *Abbott v. Office of Workers' Compensation Programs*, 899 F.2d 626 (5th Cir. 1990).

As the *Abbott* court recognized, at some point a delay in administrative or judicial appellate review constitutes a denial of a party's due process rights. Employer/Carrier submit that such is the case herein. The delay involved in Board appeals is unreasonable. Employer/Carrier submit that the nearly five year delay which occurred in the claimant's Board appeal was not contemplated by Congress, nor was it contemplated by the courts when they began awarding pre-judgment interest on past due compensation benefits. As such, employer/carrier submit that they are entitled to a review of the courts' decisions below which awarded pre-judgment interest.

This delay in the administrative review process is a significant factor in assessing the equities of the award of pre-judgment interest. In the instant case, employer/carrier submit that the delay in the administrative appeals process, nearly five years before the Board rendered a decision, rises to the level of a denial of due process. *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975).

Employer/Carrier submit that the inherent delay in the Benefits Review Board proceedings with attendant pre-judgment interest, constitutes a denial of due process rights to the employer/carrier. It is further submitted that

the delay involved in this case was unreasonable because the employer/carrier are now being required to pay prejudgment interest during the entire time the claimant's appeal remained pending before the Benefits Review Board. The employer/carrier were not responsible for the delays in the appellate process nor did they create such delays. Apparently, the delay was attributable to the amendments to the Black Lung Act, combined with the inadequacies of the pre-1984 statute empaneling only three members to the Benefits Review Board.

In 1984, Congress recognized the necessity of expanding the number of Judges empaneled. The legislative history of the 1984 amendments explains the administrative changes as follows:

> The committee notes that the Benefits Review Board of the U.S. Department of Labor, which is the agency responsible for making adjudicative decisions of claims under this Act has been plagued for years with a chronic case backlog, which detriments claimants both under this Act and the Black Lung Program. The committee believes that to be able to keep reasonably current, the size of the Benefits Review Board should be increased, and accordingly, the committee has amended Section 21 of the Act to expand the size of the Board from three members to five. Further, to assist the Board in clearing up any extraordinary backlog of claims, that section is amended to authorize the Secretary to appoint three Administrative Law Judges of the Department of Labor to serve as temporary members of the Board for periods of eighteen months, whenever the backlog of cases before the Board exceeds one thousand. The Committee believes that since these members would serve for a limited period of time, they should be selected from among the

Department of Labor Administrative Law Judges so that they are familiar with appropriate laws and procedures. Similarly, the Committee believes that such temporary members should be selected on the basis of their knowledge of and familiarity with the statutes involved and the procedures of the Board.

The Committee has made further amendments to Section 21 in order to improve the efficiency of the Board. All administrative functions of the Board are delegated to the Chairman of the Board so that the time of members need not be taken upon purely administrative functions. The Committee intends that administrative functions, in this context, be housekeeping functions which do not relate to the adjudication of claims.

To promote further efficiency, these amendments specifically authorize the Board to operate in panels of three members, provided that no more than one temporary members (sic) may serve on any given panel. This innovation is intended to improve the efficiency of the Board. The Committee fully expects that the panels will be constructed in a manner which will also promote the development of a consistent decisional law by the Board. To further that objective, the Committee amendment permits the rehearing of any case decided by a panel by the Board, *en banc*, upon an affirmative vote of the majority of the Board (permanent members, and temporary members if there are temporary members). The Committee underscores that rehearings, *en banc*, are to be a matter of the Board's discretion, not a matter of right. It is not the Committee's intention to establish an intermediate appellate review through the panel hearing and *en banc* review mechanism. The Board should exercise its discre-

> tion to rehear cases decided by the panels only where such rehearing is necessary to promote the development of a consistent decisional law by the Board, or when the decision of a panel is clearly erroneous (as a matter of fact or law or not supported by the evidence presented.)
>
> The Committee is sensitive to the fact that still further restructuring of the Benefits Review Board may be necessary to improve the effectiveness of the Board in the development of a sound decisional law, and the efficiency of the Board in deciding workers' claims under this law and others within the Board's responsibility. The Committee is reluctant to make further structural or permanent changes to the Board, other than providing it with the urgently needed additional personnel and the ability to use that personnel more effectively, without formal study and Congressional consideration of recommendations. Accordingly, the Committee amendment authorizes a study of the Board under the changes made by these amendments and requires the issuance of a report back to Congress.

Public Law 98-426, 1984, U.S. Code Cong. and Adm. News, p. 2734 at 2754-2755.

It was during this specific time period that the claimant's appeal was pending before the Benefits Review Board. It was not until 1986 that the Benefits Review Board rendered a Decision and Order which then remanded the claimant's claim to the Administrative Law Judge. Approximately one and a half years later, the Administrative Law Judge rendered a Decision and Order on remand which included an award of pre-judgment interest on past due compensation benefits. The employer/carrier submit that

they were denied a speedy resolution of this claim due to the delays in the appellate process and are now being required to pay interest. The award of pre-judgment interest thus results in a violation of due process rights. Employer/Carrier further submit that an award of pre-judgment interest which encompasses a five year appellate process is unreasonable and constitutionally deprives the employer/carrier of their property.

Although the U.S. Department of Labor offered no explanation or excuse for the delays during which the interest accrued, no excuse, not even " 'administrative convenience or even necessity can[ ] override the constitutional requirements of due process.' " *Patlex Corp. v. Mossinghoff*, 771 F.2d 480, 483 (Fed. Cir. 1985) (citing *Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), and *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292 (1937)).

CONCLUSION

It is respectfully submitted that the decision and order awarding interest was not final or "due" and the supplemental default order was rendered invalid and unenforceable. Additionally, an award of pre-judgment interest should not be allowed because there is no statutory provision for interest under the Longshore and Harbor Workers' Compensation Act. Furthermore, an award of pre-judgment interest is violative of the payors' due process rights because the delays involved in this claim were attributable to the claimant and the administrative and judicial process.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all counsel of record, by depositing same in the United States mail, properly addressed, and postage prepaid, this ____ day of _____, 1991.

_____

KATHLEEN K. CHARVET

APPENDIX A

Fred QUAVE, Claimant,
Plaintiff-Appellant,
Cross-Appellee,

v.

PROGRESS MARINE, Employer, and
American Home Assurance Co., c/o
American International Adjusting Co.,
Insurance Carrier, Defendants-Apellees,
Cross-Appellants.

No. 89-3779.

United States Court of Appeals,

Fifth Circuit.

Sept. 24, 1990

Appeals were taken from judgment of the United States District Court for the Eastern District of Louisiana, Charles Schwartz, Jr., J., in action to recover benefits under Longshore and Harbor Workers' Compensation Act (LHWCA). The Court of Appeals, Duhe', Circuit Judge, held that: (1) district court properly excluded intermediate Saturdays and Sundays when determining whether payment of compensation benefits was timely, and (2) interest could be added to past-due compensation even though there was no statutory provision under LHWCA authorizing such award.

Defendants' appeal dismissed; affirmed.

See also 721 F.Supp. 784.

Appeals from the United States District Court For the Eastern District of Louisiana.

Before REAVLEY, DUHE' and WIENER, Circuit Judges.

DUHE', Circuit Judge.

Plaintiff appeals the district court's reversal of the Deputy Commissioner's award of statutory penalties and original defendants appeal the district court's determination that plaintiff was entitled to interest and to attorney's fees. We dismiss defendants appeal of the award of attorney's fees for lack of jurisdiction and affirm the remainder.

Fred Quave filed a claim seeking Longshore and Harbor Worker's Compensation benefits from his employer, Progress Marine, Inc., and its insurer, American Home Assurance Company. On December 2, 1987, the Administrative Law Judge (ALJ) ordered the payment of compensation benefits to Quave. The ALJ did not calculate the amount of these benefits but directed the Deputy Commissioner to do so. The Deputy Commissioner did not make that determination. Defendant made an estimation of plaintiff's benefits and mailed a check for $90,002.47 to claimant on December 11, 1987.

Upon receipt of the check plaintiff filed a motion for more compensation on the grounds that the defendants had underestimated the required payment and for an assessment of a 20% penalty pursuant to 33 U.S.C. § 914(f) for untimely payment. The Deputy Commissioner determined that the defendant's owed plaintiff $7,065.49 in additional benefits, $19,413.59 in penalties under 33 U.S.C. § 914(f), and $11,293.63 in interest. Plaintiff then sought to enforce this supplemental compensation order in district court pursuant to 33 U.S.C § 918. The district court

concluded that the Deputy Commissioner erred in awarding the plaintiff additional benefits and in assessing a penalty pursuant to 33 U.S.C.§ 914(f). The court found that defendants had actually made an overpayment of compensation to the plaintiff and ordered that such overpayment be credited against the post-judgment interest award. The district court later amended its judgment to include an award of pre-judgment interest. Then defendants' counsel filed a motion for attorney's fees. In the subsequent weeks, both plaintiff and defendants filed notices of appeal. Several weeks after these notices were filed, the district court granted plaintiff's motion for attorney's fees.

Timeliness of Payment

[1] Quave contends that the district court erred by finding the payment of compensation benefits to be timely. All parties agree that pursuant to 33 U.S.C § 914(f) "[i]f any compensation . . . is not paid within 10 days after it becomes due, there shall be added to such unpaid compensation an amount equal to twenty per centum[.]" It is undisputed that Quave's compensation benefits became due on December 2, 1987 the date the ALJ's Decision and Order was filed in the Office of the Deputy Commissioner. It is also undisputed that Quave received his compensation payment on December 15, 1987. The district court, applying Fed.R.Civ.P 6(a)[1] excluded the intermediate Saturdays and Sundays in computing the applicable time limit. In do-

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[1] Fed.R.Civ.P. 6(a) provides in part:

In computing any period of time prescribed or allowed by these rules . . . the day of the act . . . from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or a legal holiday[.] . . . When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

ing so it found that the payment received on December 15, 1987 was timely. Quave argues that 29 CFR § 18.4 governs the computation of the ten day limitation period rather than Fed.R.Civ.P. 6(a). 29 CFR § 18.4 does not exclude weekends,[2] and accordingly, the 20% penalty provision of 33 U.S.C. § 914(f) would be appropriate. In *Lauzon v. Strachan Shipping Co.*, 782 F.2d 1217 (5th Cir.1985) we reserved the issue of whether the Federal Rules of Civil Procedure apply to a § 914(f) penalty assessment. We did note, however, that "[t]he Federal Rules of Civil Procedure 'apply to proceedings for enforcement or review of compensation orders under . . . U.S.C., Title 33, §§ 918, 921, except to the extent that matters of procedure are provided for in' " the LHWCA. *Id.* at 1219, citing, Fed.R.Civ.P. 81(a)(6) (emphasis added).[3] 29 CFR § 18.4 is not within the LHWCA.

"Although § 914 is not mentioned specifically in Rule 81(a)(6), this Court has held that [an order based upon] 'a "Section [9]14(f) assessment," . . . [is] a "supplementary order declaring the amount of the default" within the meaning of Section [9]18(a) of the LHWCA.' " *Lauzon*, 782 F.2d at 1219, *citing Tidelands Marine Service v. Patterson*, 719 F.2d 126, 128 n. 3 (5th Cir.1983). Coupling the plain language of Fed.R.Civ.P. 81(a)(6) with this Court's reason-

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[2] 29 CFR § 18.4 states in part: "[w]hen the period of time prescribed is seven (7) days or less, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation."

[3] In *Jourdan v. Equitable Equipment Co.*, 889 F.2d 637 (5th Cir.1989) we again recognized that the Rules of Civil Procedure apply to LHWCA matters except to the extent that matters of procedure are provided for in that Act. However, we held that service with a summons and complaint as required by Fed. R.Civ.P. 4 was inapplicable to LHWCA enforcement proceedings because proper enforcement procedures are provided for in the Act. *Id.* at 639.

ing in *Tidelands*[4] we conclude that the district court's determination that Fed.R.Civ.P. 6(a) governs was proper.

Award of Interest

[2] Next defendants argue that the addition of interest to past due compensation payments should not be allowed because there is no statutory provision under the LHWCA authorizing such an award. They concede that this Court has held to the contrary in *Strachan Shipping Co. v. Wedemeyer,* 452 F.2d 1225 (5th Cir.1971), but contend that *Strachan* is not controlling here because it relied upon a statutory provision, 33 U.S.C. § 914(m) that has been repealed. Defendants' contention is without merit. The *Strachan* court did not rely on § 914(m). Indeed the court rejected the very argument defendants now advance and reasoned that interest could be awarded under the LHWCA despite the absence of express statutory authorization. *Id.* at 1228-30.

Award of Attorney's Fees

[3] We do not here need to decide whether the district court erred in awarding attorney's fees to claimant's counsel, because the notice of appeal filed on that judgment is insufficient. The appeal before us was filed several weeks before the judgment awarding attorney's fees was entered. Fed.R.App.P. 3(c) states that "[t]he notice of appeal shall specify the party or parties taking the appeal; [and] shall designate the judgment, order or part thereof appealed from[.]

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[4] Referring to an order finding defendants in default for more than 30 days in the payment of additional compensation under § 914(f) we viewed, for jurisdictional purposes, the order as a § 918(a) compensation default order. "That which looks like a duck, walks like a duck, and quacks like a duck, will be treated as a duck even though some would insist upon calling it a chicken." *Tidelands,* 719 F.2d at 128 n.3.

PUBLISHER'S NOTE

THE FOLLOWING PAGES ARE UNAVAILABLE FOR FILMING:

A-6 & A-7

DUHE, Circuit Judge.

In our original opinion we declined to decide whether the district court erred in awarding attorney's fees to claimant's counsel because we found no separate notice of appeal from that judgment and none was called to our attention. In fact, however, there was a second notice of appeal later filed which appropriately gave us jurisdiction. That notice of appeal was inadvertently overlooked and we now address the issue previously dismissed.

A full recitation of the facts is not necessary as they have been set out in detail previously. This case involved an action to recover benefits under the Longshore and Habor Worker's Compensation Act (LHWCA). Claimant's counsel submitted an application for attorney's fees to the district court for services rendered in the enforcement proceeding. The district court, in a minute entry, granted partial award for attorney's fees equaling $600.00 and disallowed the remainder.

Original defendants, Progress Marine, Inc. and its insurer, American Home Assurance Company, argue that any award of attorney's fees was improper because claimant's counsel failed to obtain any additional "compensation."[1] He did, however, succeed in recovering

---

[1] 33 U.S.C. § 928(a) reads in pertinent part:

> If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter, and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee. . . .

an award of prejudgment interest. Defendant's argue that an award of interest is not equivalent to an award of compensation, yet fail to cite any authority for this proposition.[2] However, defendants do cite *Ayers Steamship Co. v. Bryant*, 544 F.2d 812 (5th Cir. 1977) which stated that "[a]ttorney's fees can only be assessed against the employer . . . when the claimant has successfully claimed coverage which the employer has either totally or partially denied." *Id.* at 813-14. Quave claimed interest, defendants denied such coverage and ultimately Quave was successful on his claim, at least in part. Accordingly, the petition for rehearing is granted. The previously assessed award of attorney's fees was proper and we AFFIRM.

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[2] In other context, howeve interest has been considered as part of just compensation. In *Sinclair Refining Company v. S. S. Green Island*, 426 F.2d 260, 262 (5th Cir. 1970) we noted that the general rule in admiralty is that those injured by tortuous collision are entitled to interest as a part of just compensation for the wrong done. *See also Complaint of M/V Vulcan*, 553 F.2d 489 (5th Cir. 1977).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 89-3779

FILED
DEC 13 1990

FRED QUAVE, Claimant,
Plaintiff-Appellant-Cross-Appellee,

VERSUS

PROGRESS MARINE, Employer,

and

AMERICAN HOME ASSURANCE COMPANY,
c/o American International Adjusting Company,
Insurance Carrier,
Defendants-Appellees-
Cross-Appellants.

Appeals from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

(Opinion _____, 5 Cir.,
198__, _____ F.2d ____)
(December 13, 1990)

Before REAVLEY, DUHE and WIENER, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

(✓) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellante Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

(✓) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ John M. Duhe, Jr.

United States Circuit Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
Sep 12 89

FRED QUAVE	MISC. ACTION
VERSUS	NO. 2823
PROGRESS MARINE AND AMERICAN HOME ASSURANCE COMPANY	SECTION "A"

J U D G M E N T

Considering the written Order of the Court on file herein, accordingly;

IT IS ORDERED, ADJUDGED, AND DECREED, that the motion of the defendants Progress Marine and American Home Assurance Company c/o American International Adjusting Company to dismiss plaintiff's application for entry of the deputy commissioner's March 22, 1989 supplemental compensation order is granted.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the defendants pay the plaintiff interest at the rate prescribed by the Administrative Law Judge for the period from December 2, 1987 to December 14, 1987, with defendants overpayment of disability benefits to be credited toward the amount of interest owed.

New Orleans, Louisiana, this 11th day of September, 1989.

/s/ Loretta G. Whyte
LORETTA G. WHYTE, CLERK

APPROVED AS TO FORM:

/s/ illegible
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY SEP 12 1989

MINUTE ENTRY
SCHWARTZ, J.
SEPTEMBER 8, 1989

Filed
Sep 8 89

FRED QUAVE — MISC. ACTION

VERSUS — NO. 2823

PROGRESS MARINE AND AMERICAN HOME ASSURANCE COMPANY c/o AMERICAN INTERNATIONAL ADJUSTING COMPANY — SECTION "A"

On May 5, 1989, plaintiff Fred Quave ("Quave") filed an "Application for Entry of Judgment Pursuant to United States Code 33 Section 918," seeking to enforce a "Supplemental Compensation Order Declaring Default" issued by Deputy Commissioner Donnette S. Glenn on March 22, 1989. Shortly thereafter, defendants Progress Marine, Inc. ("Progress Marine"), plaintiff's employer, and American Home Assurance Company c/o American International Adjusting Company ("American Home"), Progress Marine's insurer, filed a Motion to Dismiss plaintiff's Application for Entry of Judgment. Following oral argument and the submission of additional memoranda, defendants' motion to dismiss was taken under submission. For the following reasons, defendants' motion to dismiss is hereby GRANTED.

BACKGROUND

Plaintiff is a claimant seeking Longshore and Harbor Workers' Compensation Act benefits from his employer and his employer's insurance carrier. On December 2, 1987, an Administrative Law Judge ("ALJ") issued a "Decision and Order on Remand," pursuant to which the ALJ deter-

DATE OF ENTRY SEP 11 1989

mined that plaintiff was entitled to temporary total disability benefits for a specified time period, as well as permanent partial disability benefits for a time period extending from 1978 to 1987. However, the ALJ did not calculate the specific amount of plaintiff's permanent partial disability benefits.[1] Instead, the ALJ directed the deputy commissioner to make the appropriate calculations based upon "the difference between Claimant's average weekly wages of $397.48 at the time of injury and his post-injury wage earning capacity of $106.00 per week [minimum wage] commencing September 5, 1978, and continuing thereafter, ..." The ALJ further directed the deputy commissioner to adjust the claimant's wage earning capacity to "reflect the increases in minimum wage since 1978."

On December 11, 1987, despite the deputy commissioner's failure to calculate the precise amount of plaintiff's benefits, defendants mailed plaintiff a check in the amount of $90,002.47, which reflected the amount which defendants estimated plaintiff's temporary total and permanent partial disability benefits to be. Subsequently, plaintiff filed with the Office of Workers' Compensation Programs, Seventh Compensation District, an application for a "20% penalty" plus the difference between what plaintiff estimated his benefits to be and what defendants estimated plaintiff's benefits to be. In a March 22, 1989 "Supplemental Compensation Order Declaring Default," the deputy commissioner made the following calculations:

(1) That plaintiff's temporary total disability benefits were $3,017.08; and,

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[1] The ALJ also failed to calculate the specific amount of plaintiff's temporary total disability payments; however, defendants do not allege that the amount of plaintiff's temporary total disability benefits, as calculated by the deputy commissioner, was incorrect.

(2) That plaintiff's permanent partial disability benefits were $97,067.96.

Based on these calculations the deputy commissioner determined that defendants owed plaintiff $7,065.49 in permanent partial disability benefits. The deputy commissioner further determined that pursuant to the provisions of 33 U.S.C. § 914(f), defendants owed plaintiff $19,413.59 (20% of $97,067.96) as a penalty for untimely payment of plaintiff's permanent partial benefits; and that defendants owed plaintiff interest in the amount of $11,293.63.

The Court's review of this matter, pursuant to the provisions of 33 U.S.C. §918, is limited. A district court may review a deputy commissioner's supplemental compensation order for the purpose of determining whether the order is "in accordance with law and accurate as to the amount in default...." *Henry v. Gentry Plumbing & Heating Co.*, 704 F.2d 863, 864 (5th Cir. 1983). Having undertaken such a review, the Court finds that the deputy commissioner's supplemental compensation order is inaccurate as to the amount in default.

As stated earlier, the ALJ ordered that plaintiff was entitled to compensation for permanent partial disability "with the claimant's earning capacity to be periodically adjusted to reflect the increase in minimum wage." However, in her supplemental compensation order declaring default, the deputy commissioner used the 1978 minimum wage ($106.00 per week; 40 hours @ $2.65 per hour) as a constant for the calculation of the permanent partial disability award from 1978 to 1987. Defendants submit, and the Court agrees, that the deputy commissioner should have adjusted the permanent partial disability rate over the course of 484 weeks to reflect the increase in minimum wage from 1978 to 1987. As referenced in the report of Kenneth J. Boudreaux, Ph.D. (a copy of which is annexed

hereto), the minimum wage rates increased as follows:

1/1/78 through 12/31/78	$2.65 per hour
1/1/79 through 12/31/79	2.90 per hour
1/1/80 through 12/31/80	3.10 per hour
1/1/81 through 12/31/81	3.35 per hour

Using the proper minimum wage rates, Professor Boudreaux calculates that plaintiff's temporary total and permanent partial disability compensation totals $89,320.86. Having determined that Professor Boudreaux's calculations are correct, the Court hereby adopts said calculations and finds that plaintiff's temporary total and permanent partial benefits equal $89,320.86. Since defendants delivered to plaintiff a check in the amount of $90,002.47, a sum greater than the amount actually owed, the deputy commissioner clearly erred in assessing against defendants an additional $7,065.49 in permanent partial disability benefits.

It is equally clear that the deputy commissioner erred in assessing against defendants the sum of $19,413.59 as a penalty pursuant to the provisions of 33 U.S.C. §914(f). 33 U.S.C. § 914(f) provides, in pertinent part, as follows:

> If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation....

In the instant action, it is undisputed that plaintiff's permanent partial disability compensation became due on Wednesday, December 2, 1987, the date on which the ALJ's Decision and Order was filed in the Office of the Deputy Commissioner, Seventh District Office. It is also

undisputed that plaintiff received his compensation payment from defendants on Tuesday, December 15, 1987. It is equally clear, pursuant to the provisions of § 914(f), that defendants were required to pay plaintiff his compensation within ten (10) days from December 2, 1987, or be subject to a penalty in the amount of 20% of the compensation due. The dispute arises with regard to when this ten (10) day time limit expired. Specifically, whether December 15, 1987, the date on which plaintiff received his compensation payment, is or is not within this ten (10) day time limitation. For the following reasons, the Court finds that Tuesday, December 15, 1987, is within the ten (10) day time limitation.

Federal Rule of Civil Procedure 6(a) provides, in pertinent part, that when a period of time prescribed by statute is less than eleven (11) days, intermediate Saturdays and Sundays shall be excluded in computing the applicable time limitation. The Federal Rules of Civil Procedure are made applicable to the Longshore and Harbor Workers' Act by F.R.C.P. 81 (a)(6). Rule 81(a)(6) provides that the Federal Rules of Civil Procedure "apply to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act ... except to the extent that matters of procedure are provided for in that Act...." There is no provision in the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et. seq.*, which provides a method by which the ten (10) day time limitation in 33 U.S.C. § 914(f) should be calculated. Accordingly, the provisions of Rule 6(a) become the applicable method by which the ten (10) day time limitation is to be calculated.[2] When the intermediate Saturdays and Sundays are excluded from

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[2] *See* Wright & Miller, Federal Practice and Procedure: Civil 2d § 1163 for a good discussion regarding the benefits of applying F.R.C.P. 6 to time limitations contained in federal statutes such as the Longshore and Harbor Workers' Compensation Act.

the time period of Wednesday, December 2, 1987 (the date plaintiff's compensation payment became due) to Tuesday, December 15, 1987 (the date plaintiff received his compensation payment), it becomes clear that plaintiff timely received his payment.[3]

In arguing that Rule 6(a) is not applicable to the pertinent ten (10) day time limitation, plaintiff relies on a series of administrative law judge and benefit review board decisions wherein the ten (10) day limit was calculated without excluding intermediate Saturdays and Sundays. However, all of these decisions were decided prior to 1985. Prior to 1985, the pertinent provision of Rule 6(a) provided that intermediate Saturdays and Sundays could be excluded only if the time limitation was less than seven (7) days. Thus, contrary to plaintiff's assertion, intermediate Saturdays and Sundays were included in these pre-1985 time computations not because Rule 6(a), as a general rule, is inapplicable to Section 914(f) of the Longshore and Harbor Workers' Act; but instead, simply because the time limitation prescribed by § 914(f) was too long to fall under the pre-1985 version of Rule 6(a).

Plaintiff also relies on *Lauzon v. Strachan Shipping Co.*, 782 F.2d 1217 (5th Cir. 1985), for the proposition that the Federal Rules of Civil Procedure in general (and Rule 6(a) in particular) are inapplicable to the time limitation of § 914(f). However, plaintiff's reliance is misplaced. In *Lauzon*, the Fifth Circuit specifically declined to reach the issue regarding the "general applicability of the Federal Rules of Civil Procedure to section 914(f) assessments...." *Lauzon*, 782 F.2d at 1220. Instead, the Court determined that even if the Rules of Civil Procedure applied, Rule 6(e) (the pertinent rule which the defendant/employer sought to

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[3] The ten (10) day time limit, excluding intermediate Saturdays and Sundays, expired on Wednesday, December 16, 1987.

apply) did not afford defendant relief since its provisions apply only when a party is required to do some act following "*service* of notice or other paper upon him. [Emphasis original.]" § 914(f) requires a party to do some act (specifically, to pay compensation benefits) following "*filing* of the compensation order with the deputy commissioner. [Emphasis original.]" As such, "Rule 6(e) is inapplicable." *Id.*

With regard to interest payments, the ALJ properly ordered that defendants pay plaintiff "interest in accordance with 28 U.S.C. § 1961 on all past due benefits outstanding." Since plaintiff's benefits became due on December 2, 1987 and plaintiff did not receive those payments until December 14, 1987, defendants owe plaintiff interest, at the rate prescribed by the ALJ, for the period from December 2, 1987 to December 14, 1987.[4] Accordingly;

IT IS HEREBY ORDERED that defendants' motion to dismiss plaintiff's application for entry of the deputy commissioner's March 22, 1989 supplemental compensation order is GRANTED.

IT IS FURTHER ORDERED that defendants pay plaintiff interest, as directed above, with defendants' overpayment of disability benefits to be credited toward the amount of interest owed.

The Clerk of Court is hereby directed to enter Judgment in accordance with the above orders.

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[4] In calculating the amount of interest owed, defendants are to receive credit for their overpayment of disability benefits.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
Oct 26 89

FRED QUAVE — MISC. ACTION

VERSUS — NO. 2823

PROGRESS MARINE AND AMERICAN HOME ASSURANCE COMPANY — SECTION "A"

AMENDED JUDGMENT

Pursuant to the Court's Minute Entry dated October 25, 1989, the final paragraph of the Judgment entered herein on September 12, 1989 be and it is hereby amended to read as follows:

IT IS ORDERED, ADJUDGED, AND DECREED, that defendants owe plaintiff interest at the rate provided for in 28 USC 1961 and for the period from December 2, 1977 through December 14, 1987, on $3,017.08 in temporary total benefits.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that defendants owe plaintiff interest at the rate provided for in 28 USC 1961 and for the period from September 5, 1978 through December 14, 1987, on $86,303.78 in permanent partial benefits.

New Orleans, Louisiana, this 26th day of October, 1989.

/s/ Loretta G. Whyte
LORETTA G. WHYTE, CLERK

APPROVED AS TO FORM:

/s/ Charles Schwartz, Jr.
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY OCT 26 1989

MINUTE ENTRY
SCHWARTZ, J.
OCTOBER 25, 1989

Filed
Oct 25 89

FRED QUAVE — MISC. ACTION

VERSUS — NO. 2823

PROGRESS MARINE AND AMERICAN HOME ASSURANCE COMPANY c/o AMERICAN INTERNATIONAL ADJUSTING COMPANY — SECTION "A"

This matter is before the Court on the motion of plaintiff Fred Quave for new trial. Said motion, scheduled for oral argument on Wednesday, October 25, 1989, was taken on briefs without oral argument.

Plaintiff complains that the Court was in error in ordering, pursuant to its September 8, 1989 Minute Entry, that defendants pay plaintiff "interest, at the rate prescribed by the ALJ [Administrative Law Judge], for the period of December 2, 1987 [the date the ALJ's order was entered] to December 14, 1987 [the date plaintiff received defendants' compensation payment]." Plaintiff argues that the Court should have awarded interest for the period "from 1977 to 1987. . . ."

In determining the period over which interest was owed, the Court primarily relied upon the ALJ's December 2, 1987 "Decision and Order on Remand," as well as the Deputy Commissioner's March 22, 1989 "Supplemental Compensation Order Declaring Default." Specifically, the ALJ provided in his decision that the "Employer/Carrier shall pay to the Claimant interest in accordance with 28

DATE OF ENTRY Oct 25 1989

U.S.C. §1961 on all past due benefits outstanding;"[1] (See p. 12 of the ALJ's decision), and the Deputy Commissioner provided in her supplemental order that defendants are to pay "[i]nterest for temporary total disability for the period *12/2/87 through 12/14/87*. . . . [Emphasis added.]" (See p. 2 of the Deputy Commissioner's supplemental order.) Unfortunately, the Court's reliance was misplaced in that the above portion of the ALJ's decision was misleading and the above portion of the Deputy Commissioner's supplemental order was erroneous due to a typographical error.

The Deputy Commissioner, in determining that interest was owed for the period 12/2/87 through 12/14/87, relied on a "worksheet" prepared by Claims Examiner R.F. Ahern "outlining the sums due pursuant to the Decision and Order filed in this office on December 2, 1987." (Copy of Mr. Ahern's worksheet, along with his transmittal correspondence, is attached hereto.) However, in contrast to the Deputy Commissioner's supplemental order, the Claims Examiner's worksheet reflected that interest was due for the period of "12/2/77 -12/14/87." Thus, a typographical error was made in transposing the Claims Examiner's calculations to the Deputy Commissioner's supplemental order.

The ALJ, in providing that plaintiff shall receive "interest in accordance with 28 U.S.C. §1961. . ." actually meant that plaintiff shall receive interest in accordance with that portion of 28 U.S.C. §1961 which provides that interest shall be calculated at a "rate equal to the coupon issue yield equivalent . . . of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the

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[1] 28 U.S.C. §1961 provides, in pertinent part, that "interest shall be calculated *from the date of the entry of the judgment*, at a rate equal to the coupon issue yield equivalent . . . of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the judgment. [Emphasis added.]"

judgment." However, contrary to another portion of 28 U.S.C. §1961 which provides that "interest shall be calculated from the date of the entry of the judgment," the interest awarded in connection with benefits under the Longshore and Harbor Workers' Compensation Act, is calculated from the date these benefits become due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 559 (1978), *vacated on other grounds, Newport News Shipbldg., Etc. v. Director, Wkrs. Comp., Etc.*, 594 F.2d 986, 987 (4th Cir.1979). This is true despite the fact that there may be delays in processing a plaintiff/claimant's benefit claims which are beyond the defendant/employer's control. *Id.* The rationale for this rule is that the defendant/employer improperly had the use of money which rightfully belonged to the plaintiff/claimant during the pertinent time period. *Id.*

In the instant case, the ALJ determined that plaintiff's temporary total disability benefits became due on December 2, 1977; and that plaintiff's permanent partial disability benefits became due on September 5, 1978. Accordingly;

IT IS HEREBY ORDERED that plaintiff's motion is GRANTED to the extent that plaintiff seeks the Court to amend its September 8, 1989 Minute Entry to provide that defendants owe plaintiff interest at the rate provided for in 28 U.S.C. §1961 and for the period from December 2, 1977 through December 14, 1987, on $3,017.08 in temporary total benefits; and that defendants owe plaintiff interest at the rate provided for in 28 U.S.C. §1961 and for the period from September 5, 1978 through December 14, 1987, on $86,303.78 in permanent partial benefits. To the extent that plaintiff, pursuant to said motion, seeks any greater relief, plaintiff's motion is DENIED. The clerk of Court is hereby directed to amend the Judgment entered in the above captioned matter on September 12, 1989, in accordance herewith.

APPENDIX F

U.S. Department of Labor
Employment Standards Administration
Office of Workers' Compensation Programs
Seventh Compensation District

. . . . . .

In the matter of the claim for compensation under the Longshore and Harbor Workers' Compensation Act

FRED RAY QUAVE
Claimant

VS.

PROGRESS MARINE
Employer

AMERICAN HOME INSURANCE COMPANY
c/o AMERICAN INTERNATIONAL ADJUSTING CO.
Insurance Carrier

SUPPLEMENTAL COMPENSATION ORDER DECLARING DEFAULT Section 14(f) (33 USC 918a)

OWCP NO.: 7-38334
CASE NO.: 81 LHC-876

. . . . . .

No hearing having been held or deemed necessary by the Deputy Commissioner, the Deputy Commissioner makes the following:

FINDINGS OF FACT

1. That this office is with jurisdiction to consider the claimant's application for enforcement of the provisions of 33 USC 914(f). See *Tidelands Marine v. Patterson*, 719, F.

2d 126, (5th Cir. 1983); *Lauzon v. Strachan Shipping Co.*, 782 F. 2d 1217 (5th Cir. 1985);

2. That on December 2, 1987, the Decision and Order of the Honorable Parlen L. McKenna, Administrative Law Judge, was filed in the office of the Deputy Commissioner; said Decision and Order is incorporated herein by reference in its entirety;

3. That the payment of compensation was payable within ten days of the filing of this Decision and Order as required by 33 USC 914(f);

4. That the employer/carrier filed a Motion to Stay Payments with the Benefits Review Board. Said Motion was denied on December 1, 1987 by the Benefits Review Board. This Order is incorporated herein by reference.

5. The parties have stipulated to the facts surrounding the delivery of compensation to the claimant (Order of Remand, filed October 25, 1988). This Order is incorporated herein by reference. Compensation was paid to the claimant on December 15, 1987, in the amount of $90,002.47, having been deposited in the mail on December 11, 1987, picked up by the U.S. Postal Service on December 14, 1987, and delivered to the claimant on the 15th of December, 1987.

6. Compensation was due pursuant to the Decision and Order of Parlen L. McKenna filed December 2, 1987, as follows:

Temporary Total Disability

12/16/75 through 1/13/76	4 1/7 weeks @ $264.99	=	$ 1,097.82
9/22/77 through 12/1/77	10 1/7 weeks @ $264.99	=	$ 2,687.76
	TOTAL		$ 3,785.58

Credit Temporary Total Disabilty		
12/16/75 through 1/13/76 4 1/7 weeks @ $185.50	=	$ -768.50
(order, P. 2)		
		$ 3,017.08

Permanent Partial Disability		
9/5/78 through 12/14/87 484 weeks @ $194.32	=	$94,050.88
Unpaid temporary total disability		+3,017.08
Total due pursuant to Order		$97,067.96
Amount paid (Dec. 15, 1987)		-90,002.47
Underpayment		$ 7,065.49

7. Based upon the foregoing the employer/carrier is found to be in default in the amount of $7,065.49.

8. Additionally, the employer/carrier having failed to pay compensation as required by 33 USC 914(f) on the sum of $97,067.96, owe to the claimant additional compensation in the amount of $19,413.59 (20% of $97,067.96).

9. Interest for temporary total disability for the period 12/2/87 through 12/14/87, is due in the amount of $1,620.30, and for permanent partial disability from 9/5/78 through 12/14/87 in the amount of $9,673.33.

Based on the foregoing Findings of Fact the Deputy Commissioner makes the following

ORDER

The employer/carrier are declared in default of payments due pursuant to the Decision and Order filed in the office of the Deputy Commissioner on December 2, 1987. The amount of the default is found to be in the sum of $7,065.49.

Having failed to timely pay compensation as re-

quired by 33 USC 914(f) the employer/carrier shall pay to the claimant the sum of $19,413.59, plus interest in the amount of $11,293.63

Given by my hand and filed at New Orleans, Louisiana, this 22nd day of March, 1989

/s/ Donnette S. Glenn

DONNETTE S. GLENN
Deputy Commissioner
Seventh Compensation District

CERTIFICATE OF FILING AND SERVICE

I certify that on March 22, 1989 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, Seventh Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Mr. Fred Quave, Rte. 2, Box 93 B, Bogalusa, LA 70427

(Claimant)

Progress Marine, P. O. Box 2548, Morgan City, LA 70380

(Employer)

American International Adjusting Co., P. O. Box 30707, New Orleans, LA 70190

(Insurance Carrier)

Joseph Weigand, Esq., P. O. Box 6062, Houma, LA 70361N/A

(Counsel for Claimant)

Lance S. Ostendorf, Esq., 643 Magazine St., New Orleans, LA 70130-3477

(Counsel for Employer/Carrier)

Honorable Richard D. Mills, Office of Administrative Law Judges, Ste 530, Heritage Plaza, 111 Veterans Memorial Boulevard, Metairie, Louisiana 70005

/s/ Donnette S. Glenn

DONNETTE S. GLENN
Deputy Commissioner
Seventh Compensation District

APPENDIX G

U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005

In the Matter of	
FRED RAY QUAVE Claimant	
	Case No. 81-LHC-876N
v.	
	OWCP No. 7-38334
PROGRESS MARINE, INC. Employer	
and	
AMERICAN HOME INSURANCE CO. Carrier	

DECISION AND ORDER ON REMAND

This is a claim for compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* (the Act), as extended to cover certain employees under the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. §1331 *et seq.*, and the governing regulations thereunder filed by Fred Ray Quave, Claimant, against Progress Marine, Inc., Employer and American Home Insurance Company, Carrier. A hearing was

originally held in this case on May 11, 1981 and May 29, 1981.[1] A Decision and Order was issued by the Administrative Law Judge on October 20, 1981, denying the claim on the ground that it was not timely filed. The Claimant appealed, and the Benefits Review Board issued a Decision and Order on February 25, 1986, finding that the claim was timely filed, remanding the case for further consideration.

STIPULATIONS

At the original hearing, the parties stipulated:

1. That the parties are subject to the Act;

2. That Claimant and Employer were in an employee/employer relationship at the time of the injury;

3. That Claimant was injured on November 24, 1975;

4. That Claimant was in the course and scope of his employment;

5. That compensation benefits were paid to Claimant for temporary total disability from December 16, 1975 to June 13, 1976 at a rate of $185.50 per week for a total of $768.50 to date of hearing.

ISSUES

The issues which remain unresolved:

1. Whether Claimant's disability is work-related.

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[1] In this decision "CX" and "RX" refer to Claimant's exhibits and Respondent's exhibits, respectively. "Tr." refers to the transcript of the hearing.

2. The nature and extent of Claimant's disability;

3. Date of maximum medical improvement;

4. Average weekly wage.

STATEMENT OF THE CASE

The Claimant was 50 years old at the time of the hearing and has a seventh grade education. He was injured on November 24, 1975, while working offshore as a crane operator and welder for Progress Marine, Inc. The injury occurred while the Claimant was welding on the cellar deck of a platform, 20 feet below the main deck. A co-worker located approximately 50 feet above the Claimant dropped a large board and it struck the Claimant in the lower back. The Claimant testified that he was in pain but he did not want to go to the doctor unless it was serious, so he completed the hitch. He went home for his regularly scheduled seven days off, then returned to work (Tr. 24). Toward the end of the hitch his leg began hurting, so the Claimant went to Dr. Newman on December 10, 1975. Dr. Newman took x-rays which showed an old compression fracture at L-1 which the Claimant had sustained after falling off of a roof in 1973. The fracture had healed and Dr. Newman found the remaining vertebral bodies intact and the disc spaces preserved throughout. Dr. Newman diagnosed a severe contusion of the right hip. He prescribed medication and physical therapy, and discharged the Claimant as cured January 12, 1976. The Claimant received compensation benefits from Progress Marine from December 16, 1975, until January 13, 1976, at which time he returned to his regular duties.

The claimant continued working for Progress Marine, Inc., throughout 1976 and 1977. He testified that

he continued to have pain in his back and leg, but that it was not serious enough to prevent him from working. Dr. Newman continued to refill the Claimant's prescription for pain medication. The Claimant testified that he began experiencing severe pain in his leg and hip in September 1977, so he went to Dr. Newman and Dr. Hebert. The Claimant stated that he notified the Employer's insurer before he went to the doctor, and was told that his compensation would be reinstated and his medical expenses would be paid. The Claimant testified that a few days later, however, he received a telephone call and was informed that his claim had prescribed and he would not be receiving compensation or payment of his medical bills (Tr. 103-104). The Claimant visited Dr. Newman on September 26 and October 3, 1977. Dr. Newman reported that the Claimant was experiencing pain in his right hip, and Dr. Newman related it to the Claimant's on-the-job injury in 1975. Dr. Newman prescribed medication which did not alleviate the Claimant's pain, so he referred the Claimant to Dr. Sinclair, an orthopedic surgeon. The Claimant testified that he saw Dr. Sinclair, but that Dr. Sinclair did not say whether there was anything wrong with him (Tr. 69).

The Claimant entered Tulane Medical Center on October 31, 1977. Lumbosacral spine x-rays revealed narrowing of the L3-4 interspace with slightly increased anterior osteophytic formation and mild spur formation at the other lumbar levels, as well as an old compression fracture of L-1. A lumbar myelogram revealed the healed fracture of L-1 with a slight impression on the spinal canal at the same level. An electromyogram yielded normal results. The physical examination revealed restriction of motion of the lumbar spine, soreness to palpation, and paraspinous muscle spasms. Dr. Correa diagnosed a chronic lumbosacral sprain and had the Claimant undergo physical therapy and use of a TENS unit. Dr. Correa reported that the Claimant

improved with conservative treatment. He prescribed medication for the Claimant and discharged him on November 12, 1977. The Claimant testified that he stayed home for a few weeks, then returned to work for Progress Marine. He was placed in a light duty position in which he earned the same hourly rate as he had before, but he worked less hours. The Claimant stated that he continued working for Progress Marine until he was laid off in 1978. The parties stipulated that September 5, 1978 was the date the Claimant last worked for Progress Marine (Tr. 112).[2] The Claimant testified that the only steady employment he had after that date was a welding position with C.M.I.C. Corp., where he worked for approximately nine months and earned approximately $10,000.

At the request of the Employer's insurer, the Claimant saw Dr. Williams, an orthopedic surgeon, on September 28, 1978. Dr. Williams reported that the Claimant complained of constant pain in the right hip area with diffuse stiffness and occasional weakening of the legs. The physical examination revealed no paraspinous muscle spasm or tenderness of the spinous processes. X-rays showed an old healed compression fracture of L-1, with small degenerative osteophytes at L-2 and L-3. Dr. Williams noted that the small paraspinous bones adjacent to the L-3, L-4 and L-5 transverse processes were suggestive of possible old avulsion fractures. Dr. Williams reported that there were no findings to explain the Claimant's symptoms. He was unable to recommend further treatment based on the clinical findings, and urged the Claimant to resume his activities.

At the recommendation of his attorney, the Claimant

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[2] The Claimant filed his compensation claim against Progress Marine on May 30, 1978.

saw Dr. Cenac, a board certified orthopedic surgeon, on May 21, 1980. The Claimant's complaints were continuous low back pain and right hip pain. The physical exam and x-rays revealed no neurological deficit in either lower extremity. There were objective findings of limitation of motion in the lower back, as well as muscle spasm and point tenderness over the paraspinous muscle masses in the right lower lumbar region, indicative of continued muscle irritability. The x-rays revealed a healed fracture at L-1 and non-healed transverse process fractures at L-2, L-3, L-4 and L-5 on the right (Tr.77). A bone scan revealed that there was no longer any active attempt on the body's part to unite the fractures. Dr. Cenac indicated his diagnosis as low back pain post-trauma residual from un-united transverse process fractures at L-2, L-3, L-4 and L-5 on the right (Tr. 77). Dr. Cenac stated that he reviewed an x-ray film series from 1973, when the Claimant sustained the fracture at L-1, and the fractures at L-2, L-3, L-4 and L-5 were not present at that time. They were present in the film series taken after Claimant's accident in 1975, however, so Dr. Cenac opined that the unhealed fractures were caused by the Claimant's work-related accident in 1975 (Tr. 77-78). Dr. Cenac indicated that the Claimant had reached maximum medical improvement several months after the accident in 1975, and that his muscles would never completely heal (Tr. 91). Dr. Cenac assigned the Claimant a disability rating of 10 percent impairment of the body as a whole. He stated that the Claimant should avoid heavy lifting greater than 75 to 100 pounds. He recommended no overhead manual labor or repetitive stooping or straining with weights. Dr. Cenac testified that he frequently performed pre-employment physicals. He stated that he would not pass the Claimant to work in a shipyard as a welder or to work offshore as a crane operator, but he stated that the claimant could return to work within the restrictions set forth (Tr. 83-84). Dr. Cenac last saw the Claimant on July

1, 1980.

DISCUSSION, FINDINGS AND CONCLUSIONS OF LAW

The findings of fact and conclusions of law which follow are prepared upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Each exhibit entered, particularly those related to Claimant's medical condition, although perhaps not specifically mentioned in this decision, have been carefully reviewed and given thoughtful consideration.

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, to weigh the evidence, and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiners. *Todd Shipyards v. Donovan,* 300 F.2d 741 (5th Cir. 1962); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce,* 661 F.2d 898, 900 (5th Cir. 1981); *Bank v. Chicago Grain Trimmers Association, Inc.,* 390 U.S. 454, 467, *reh. den.,* 391 U.S. 929 (1968). At the outset it further must be recognized that all factual doubts must be resolved in favor of the Claimant. *Wheatley v. Adler,* 407 F.2d 30 (D.C. Cir. 1968); *Strachan Shipping Co. v. Shea,* 406 F.2d 521 (5th Cir.), *cert. den.,* 395 U.S. 921 (1969). Furthermore, it has been consistently held that the Act must be construed liberally in favor of the Claimant. *Voris v. Eikel,* 346 U.S. 328, 333 (1953); *J.B. Vozzolo, Inc. v. Britton,* 377 F.2d 144 (D.C. Cir. 1967).

The Claimant has the burden of establishing a *prima facie* case of compensability, namely, he must demonstrate a physical or mental impairment and prove some circumstances at work which could have caused the alleged

impairment. *Graham v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 336, 338 (1981); *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, United States Department of Labor,* 455 U.S. 608, 616 (1982). Once Claimant establishes his *prima facie* case, Section 20(a) of the Act favors him with the presumption that the harm was caused by the accident. *Malaita v. Triple A Machine Shop,* 13 BRBS 326 (1981).

In the present case, the Claimant alleges that he sustained a work-related injury on November 24, 1975, which was the cause of the severe pain he experienced in September 1977 and continued to experience as of the date of the hearing. It has been held that the Claimant must show (1) that he sustained physical harm, and (2) that a work-related accident occurred, or working conditions existed which could have caused the harm. Once these two elements are established, a Claimant has established a *prima facie* case and is entitled to a presumption that the injury arose out of employment. *Kelaita v. Triple Machine Shop,* 13 BRBS 326 (12981) (leading Board case); *Adams v. General Dynamics Corp.,* 17 BRBS 258 (1985). The Section 20(a) presumption does not aid the Claimant in establishing his *prima facie* case.

The Claimant established that he sustained physical harm from the work-related accident which occurred on November 24, 1975. He testified that he continued to experience pain in his lower back and hip area, as well as in his leg, even after he returned to work. The Claimant stated that he experienced the same type of pain in September 1977, but it was much more severe (Tr. 50). The Claimant also testified that he had not had any type of accident after his on-the-job accident in 1975. Additionally, based on the Claimant's history and his review of the x-ray films, Dr. Cenac related the Claimant's pain to his work-related injury of November 24, 1975. Therefore, I find that the Claimant has established a *prima facie,*case of compensability.

Once Claimant establishes his *prima facie* case, the Section 20(a) presumption operates to link the impairment and the injured employee's employment. *Darnell v. Bell Helicopter International, Inc.*, 16 BRBS 98,99 (1984). After the presumption has been established, the Employer has the burden of rebutting the presumption by substantial evidence to contrary, namely that the injury was not caused by the employment. *Brennan v. Bethlehem Steel Corp.*, 7 BRBS 947, 951 (1978). More specifically, in order to overcome the presumption of compensability, the evidence must be specific and comprehensive enough to sever the potential connection between the disability and the work environment. *Parsons Corp. v. Director, OWCP, United States Department of Labor*, 619 F.2d 38, 41 (9th Cir. 1980).

The Employer asserts that a sufficient amount of time elapsed between the date of the accident, November 24, 1975, and the time when the Claimant began experiencing additional pain in September 1977 to sever any possible connection between the 1975 injury and any subsequent disability the Claimant suffered from. The Employer offered no evidence, however, to indicate that the Claimant suffered any type of accident subsequent to November 24, 1975. Additionally, while the Employer maintains that Dr. Cenac has no way of determining whether the Claimant's symptoms in 1980 were caused by the November 1975 accident, Dr. Cenac testified that his opinion was based on the x-ray films he reviewed, as well as the Claimant's history. Therefore, I find that the Employer has not submitted sufficient evidence to rebut the Claimant's *prima facie* case. Accordingly, I find that the Claimant is entitled to compensation.

The nature and extent of Claimant's disability must next be determined. As envisioned under the Act, disability is an economic concept based upon a medical foundation.

Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968);l *Owens v. Traynor*, 274 F.Supp. 770 (D. Md. 1967), *aff'd* 396 F.2d 783 (4th Cir.). *cert. den.*, 393 U.S. 962 (1968). Thus, the degree of disability in any situation cannot be measured solely by the Claimant's physical or medical condition. Consideration must be given to Claimant's age, education, industrial history and the availability of work for the disabled Claimant. Claimant, however, has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. *Henigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978); *Ashey v. General Dynamics Corp.*, 16 BRBS (ALJ) 110 (1983).

Claimant's disability must be considered permanent in nature if it is continual, lasting and indefinite. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. den.*, 394 U.S. 976, 89 S.Ct. 1471, 22 L.Ed 2d 755 (1969); *General Dynamics v. Benefits Review Board*, 565 F.2d 208 (2nd Cir. 1977). A disability is permanent when the Claimant has attained maximum medical improvement. Maximum medical improvement may be found where a Claimant's condition only deteriorates after a physician rates it as stable. *Davenport v. Apex Decorating Co.*, 18 BRBS 194 (1986). The question of when Claimant has reached maximum medical improvement is primarily a question of fact. When making factual determinations, the Court has discretion to weigh the evidence, draw inferences from it, and reach conclusions it finds most reasonable. *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979). The Court's determination of the date upon which a Claimant attains maximum medical improvement will be upheld if reasonable. *Williams, supra*, 10 BRBS at 917-18.

In the instant case, Dr. Cenac testified that the Claimant reached maximum medical improvement several months after the accident on November 24, 1975. Additionally, Dr. Newman released the Claimant to return to

work on January 12, 1976. Therefore, since Dr. Cenac did not give a specific date, I find that the Claimant reached maximum medical improvement on January 12, 1976, at which time his condition became permanent.

The Employer concedes that the Claimant was temporarily totally disabled from December 16, 1975 until January 13, 1976, but asserts that once the Claimant's condition became permanent he no longer suffered from any disability. The Claimant alleges that he continues to suffer from a permanent partial disability. The Claimant's position is supported by Dr. Cenac's testimony that the Claimant reached maximum medical improvement shortly after the injury in November 1975, and thereafter suffered a 10 percent disability of the body as a whole. Dr. Cenac stated that the Claimant's condition was not totally disabling and would allow him to return to work within certain restrictions. Additionally, the parties stipulated at the hearing that the Claimant was capable of securing employment at minimum wage. Therefore, based on the medical evidence and the stipulations of the parties, I find the Claimant temporarily totally disabled from December 16, 1975 to January 13, 1976, at which time his disability became permanent and partial to date and continuing.

To determine the compensation benefits for temporary total disability, Section 8(b) of the Act provides:

> (b) Temporary total disability: In case of a disability total in character but temporary in quality 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

To calculate compensation benefits for a permanent partial disability which is not a scheduled injury, Section 8(c)(21) of the Act provides:

> . . .the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

In determining Claimant's average weekly wages, Section 10 of the Act provides a two-step process for calculation of average weekly wage: (1) Average annual earnings are computed under one of the first three subsections of Section 10 of the Act; and (2) this average annual earnings figure is then divided by 52 pursuant to Section 10(d) to arrive at an average weekly wage. 33 U.S.C. §910(a) - (d). For purposes of awarding compensation under the Act, Congress intended by this section to determine a claimant's earning power at the time of injury. *Orkney v. General Dynamics Corp.*, 8 BRBS 543 (1978). Therefore, a Claimant's average weekly wage is to be determined as of the time of injury. *Hastings v. Earth Satellite Corp.*, 8 BRBS 519 (1978), *aff'd in pertinent part*, 628 F.2d 85, 14 BRBS 345 (D. C. Cir. 1980), *cert. den.*, 449 U.S. 905 (1980).

In the present case, the parties stipulated that the Claimant's annual earnings for the year preceding his injury were $19,874.28. The Claimant did not work the last two weeks of 1975 because of his injury. Therefore, dividing $19,874.28 by 50, I find the Claimant's average weekly wage to be $397.38.

The post-injury wage-earning capacity of a partially disabled Claimant is determined by his actual earnings if they fairly and reasonably represent his wage-earning capacity. In the instant case, the Claimant returned to his usual employment on January 13, 1976. He worked the same number of hours as before his injury and received the

same hourly wages until September 22, 1977.[3] At time the Claimant was experiencing pain and sought medical attention from Dr. Newman, Dr. Hebert, Dr. Sinclair, and finally Dr. Correa of the Tulane Medical Center. The Claimant testified that when he returned to work for Progress Marine at the beginning of December 1977, he was placed in a light duty position because of his disability. The Claimant stated that he received the same hourly wages as he had previously, but that he was guaranteed less hours per week. Despite the Claimant's testimony, the Claimant's payroll stubs which were submitted into evidence indicate that the Claimant was earning approximately the same amount when he returned to work in December 1977 as he had been earning previously. The Claimant continued working for Progress Marine until he was laid off September 5, 1978. There is nothing in the record to indicate that the Claimant's actual earnings up until September 5, 1978, did not fairly represent his earning capacity. Therefore, I find that the Claimant's earning capacity after the injury until September 5, 1978 was the same as at the time of the injury. As a result, he suffered no loss of income until September 5, 1978, except for the periods when he was temporarily totally disabled from December 16, 1975 until Janaury 13, 1976, and September 22, 1977 until December 1, 1977. The Claimant testified that a few weeks before he was actually laid off, his Employer had attempted to fire him because of his disability, but had told him to return to work since they could not fire him for his disability. The Claimant testified that he believed his employment with Progress Marine was terminated on September 5, 1978 due to his disability, although his Employer indicated to the Claimant at that time that they had too many employees and needed to let

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[3] The insurance report by Mr. Buras indicates that September 22, 1977, is when the Claimant began losing time from his employment with Progress Marine.

some go (Tr. 34). The Employer offered no evidence to dispute the Claimant's allegation that he lost his job because of his disability. I find the Claimant to be credible, and I therefore find that the Claimant's employment with Progress Marine was terminated because of his disability which resulted from his injury on November 24, 1975. The parties stipulated at the hearing that at the time the Claimant left Progress Marine, he was capable of securing employment paying minimum wage (Tr. 135). Therefore, I find the Claimant's earning capacity as of September 5, 1978 to be $106.00 per week.[4] Claimant's permanent partial disability benefits shall be paid accordingly. In computing the Claimant's benefits, his earning capacity shall be adjusted to reflect the increases in minimum wage since 1978. This matter can be handled by the Deputy Commissioner.

Employer paid compensation benefits for temporary total disability from December 16, 1975 to January 13, 1976 at a rate of $185.50 per week. This was an underpayment, as the compensation rate during that period for temporary total disability should have been $264.99, which is 66-2/3 percent of the average weekly wage of $397.48. Accordingly, Employer is liable for the unpaid amount. Additionally, the Employer failed to pay benefits to the Claimant for the time during which he was unable to work due to his injury from September 22, 1977 until December 1, 1977. Therefore, the Employer is liable for temporary total benefits from September 22, 1977 to December 1, 1977.

The Benefits Review Board decided the issue of Claimant's past medical expenses, but the Employer/Carrier remains liable for reasonable future medical care and

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[4] This is based on 40 hours per week at $2.65 per hour, which is the minimum wage which was in effect in 1978.

treatment related to the Claimant's injury of November 24, 1975.

Interest is assessed on past due benefits to ensure that a claimant receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in part sub nom; Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). To ensure uniformity under the Act, the Benefits Review Board has adopted the interest rate used by the U.S. District Courts under 28 U.S.C. §1961 (1982). This has been followed in *Grant v. Portland Stevedoring Co.*, 17 BRBS 20 (1985). The statute, the Federal Courts Improvement Act, provides:

> [a] . . . [S]uch interest shall be calculated from the date of the entry of the judgment at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of 52 week United States treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the Court shall distribute notice of that rate and any changes in it to all federal judges.

Interest on past due benefits shall be computed on the foregoing basis. *Grant v. Portland Stevedoring Co., supra.*

Claimant's attorney, having successfully represented him herein, is entitled to an attorney's fee to be assessed against the Employer. Within 20 days of the receipt of this Order, Claimant's attorney shall file a fully supported and fully itemized application complying with the requirements of Section 28 of the Act and the implementing regulations concerning those necessary and reasonable services rendered and costs necessarily incurred

after referral of this proceeding to the Office of Administrative Law Judges. A copy of the application must be served on opposing counsel who shall then have 10 days to respond with objections thereto.

Based upon the foregoing findings of fact, conclusions of law, and the entire record, I make the following compensation Order. The specific dollar computations of the compensation award shall be administratively performed by the Deputy Commissioner. Interest as hereinafter provided in the Order is applicable to all past due weekly installments of compensation.

ORDER

Therefore, it is the ORDER of the Administrative Law Judge that:

1. Employer/Carrier shall pay to Claimant compensation for temporary total disability commencing December 16, 1975 through Janaury 13, 1976 and commencing September 22, 1977 through December 1, 1977 based on an average weekly wage of $397.48, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Employer/Carrier shall pay to the Claimant compensation for permanent partial disability in accordance with Section 8(c)(21) of the Act, based upon 66-2/3% of the difference between Claimant's average weekly wages of $397.48 at the time of injury and his post-injury wage earning capacity of $106.00 per week commencing September 5, 1978, and continuing thereafter, excluding the period from September 22, 1977 until December 1, 1977, with the Claimant's earning capacity to be periodically adjusted to reflect the increase in minimum wage.

3. Employer/Carrier shall receive credit for all compensation previously paid to Claimant for his work-related injury of November 24, 1975.

4. Employer/Carrier shall continue to furnish such reasonable and necessary medical care and treatment as the Claimant's work-related injury of November 24, 1975, may require.

5. Employer/Carrier shall pay to the Claimant interest in accordance with 28 U.S.C. §1961 on all past due benefits outstanding.

6. Claimant's attorney, within 20 days of the receipt of this Order, shall submit a fully supported fee application, a copy of which shall be sent to opposing counsel who shall then have 10 days to respond with objections thereto.

/s/ Parlen L. McKenna
PARLEN L. MCKENNA
Administrative Law Judge

Dated: NOV 30 1987
Metairie, Louisiana

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CERTIFICATE OF FILING AND SERVICE

I certify that on **DEC 02 1987** the foregoing Decision and Order was filed in the Office of the Deputy Commissioner, Seventh District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Fred Quave, Rte. 2, Box 93 B, Bogalusa, LA 70427

Claimant

Progress Marine, Inc.

Employer

American Int'l. Adjustment Co., P. O. Box 30707, New Orleans, LA 70190

Insurance Carrier

Christopher Siegrist, P. O. Box 6062, Houma, LA 70361

Attorney for Claimant

James Lambert, Esq., P. O. Box 3527, Lafayette, LA 70402

Attorney for Employer/Insurance Carrier

A copy was also mailed by regular mail to the following:

Judge *Parlen L. McKenna* , Office of the Administrative Law Judges, U.S. Department of Labor, Heritage Plaza, Suite 530, 111 Veterans Memorial Boulevard, Metairie, Louisiana 70005

/s/ Donnette S. Glenn

DONNETTE S. GLENN
Deputy Commissioner
Seventh Compensation District
U. S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs